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No. 95-561

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1995

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, et al.,

Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INCORPORATED,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

1. Petitioners sought certiorari for several reasons. First, this case squarely raises important questions about a key structural component of federalism -- whether Congress has authority under Article I of the United States Constitution to waive a State's immunity from money damages actions and, if so, whether that authority extends equally to all Article I powers. Second, these questions have sharply divided the United States Courts of Appeals and warrant prompt resolution. Since the Court's plurality decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), lower courts have broadly disagreed -- and continue to disagree -- about the breadth and rationale of that decision. Compare *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, No. 94-12, *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), and *The Ohio Agricultural Commodity Depositors Fund v. Mahern*, 59 F.3d 630 (7th Cir. 1995). Third, this case raises a question of special concern to all 50 States. As shown by the amicus brief filed by the State of California in support of the petition, the States are as one in requesting the Court to overrule, or at least limit, *Union Gas* in order to preserve their time-honored prerogative of immunity from money-damages suits.

Respondent, in opposing the petition, conspicuously fails to challenge these critical premises. At no point in his brief does he dispute the importance of this federal question. Nor does he disagree that at least three Courts of Appeals have reached different conclusions about the impact of *Union Gas*. And, above all, he does not defend *Union Gas* -- even though the States, including most notably his own, have all called for its overruling.

2. What Respondent does argue in no way undermines these traditional bases for granting certiorari. Respondent initially suggests that even though the parties admittedly have a very real case and controversy today, they may not have one at some as-yet-undefined point in the future. Opp. Br. at 3. Pointing to collateral litigation involving the question whether certain Ohio farmers received preferential transfers from the debtor, *see Merchants Grain, Inc. v. Adkins*, 184 Bankr. 52 (S.D. Ind. 1995), Respondent claims that if he ultimately loses that ongoing litigation, the State will not be liable for $3 million.

This argument overlooks several critical points. It first overlooks Respondent's aggressive efforts to prevent this contingency from happening: He has appealed the district court's preferential-transfer ruling in the collateral action to the Seventh Circuit, No. 95-2625, and continues to seek recovery from the State in this action. Nor is the collateral action likely to be resolved any time soon. The appeal to the Seventh Circuit is in its nascent stages; briefing has only just begun.

But, most importantly, this argument incorrectly focuses on one component of Eleventh Amendment immunity while slighting another. Immunity from suit is not just about money. It is also about the affront of being haled into court by a private party against a State's will -- in this case, about being made an involuntary defendant in a bankruptcy proceeding commenced by an Indiana citizen in a federal court in Indiana. In rejecting a similar argument to the one Respondent is making here, this Court observed that

> respondent's claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "[t]he very object and purpose of the 11th amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, ____ U.S. ____, 113 S.Ct. 684, 689 (1993) (quoting *In Re Ayers*, 123 U.S. 443, 505 (1887)).

Just as this Court in *Puerto Rico Aqueduct* permitted interlocutory appeals of denied sovereign immunity motions because they "purport to be conclusive determinations that [States] have no right not to be sued in federal court," 113 S.Ct. at 688, it is no less appropriate in this instance to review a case that may or may not be affected by a future collateral action. Both types of actions are the same for Eleventh Amendment purposes. In each

instance, the State may ultimately succeed in protecting one Eleventh Amendment value -- its Treasury; but, at the same time, it will be forced to sacrifice a second Eleventh Amendment value -- being free from the indignity and expense of defending the action at all. Confirming the point is this Court's review of the Third Circuit's decision in *Pennsylvania v. Union Gas* itself. The Court did not wait until Pennsylvania had been hit with a money-damages award; it instead immediately reviewed the State's motion to dismiss on Eleventh Amendment grounds. The Court should review this case as well.

3. Respondent's second argument is a variation of his first. He contends that the case may still become moot no matter what happens in the preferential-transfer action, because at some still-later date it may be determined that the State has a duty to indemnify the potential liability of the Ohio farmers. Opp. Br. at 4-5. As an initial matter, however, the State has never conceded liability to the farmers; it has merely acknowledged that the question of liability exists under State law.

More fundamentally, the argument once again disrespects the State's Eleventh Amendment right to be free from suit now, not just to be free from liability at some later date. Having chosen to file this $3 million action against the State in the first instance, Respondent is ill-positioned to complain that the action eventually may become unnecessary. Respondent initiated this lawsuit. He has never claimed that the case was moot (at least before now). And he has not yet dismissed it. Unless and until Respondent drops this action, he is ill-positioned to complain about the State's current interest in terminating it. As previously shown, the Eleventh Amendment not only protects States from liability for money-damages actions brought by private parties; but it also protects them from having to defend them at all.

4. Respondent next suggests that the case is a poor vehicle for reviewing Congress's authority to waive state sovereign immunity because it is unclear whether the Ohio Agricultural Commodity Depositors Fund is in fact a State entity. Opp. Br. at 5-6. Nothing could be further from the truth. "[T]here can be no

doubt," the Seventh Circuit correctly found, "that the State of Ohio is the real party in interest" in this action. Appendix, at 5. The conclusion has ample support. Under Ohio law, (1) the Fund is a part of the state treasury, O.R.C. 926.16(A); (2) it is administered by the Director of the Ohio Department of Agriculture, a State official acting in his official capacity and paid by the State (and therefore also protected by the Eleventh Amendment), O.R.C. 926.16(D); (3) all claims for indemnification from the Fund are filed with the Director who assesses the claim and provides for payment, O.R.C. 926.18(A) and (C); (4) "all disbursements from the [F]und shall be paid by the treasurer of state pursuant to vouchers authorized by the Director," O.R.C. 926.18(D); and (5) the Director is responsible for requesting an appropriation from the general revenue fund of Ohio in the event that monies in the Fund "are not sufficient to pay the examination and administrative costs of this Chapter," O.R.C. 926.19(C).

The enabling legislation also provides:

> This chapter is enacted for the benefit of the state, and neither the state, its departments, agencies, or commissions, or its employees and officials either elected or appointed, shall be held liable for any injuries to third parties, for the exercise of their authority, or for the use of their discretion on the matters to which this chapter relates.

O.R.C. 926.33(B). As these provisions make clear, the Ohio legislature intended the Fund and its administrators to come within the protections of the State under the doctrine of sovereign immunity. The Fund, under these circumstances, plainly is a State entity for purposes of Eleventh Amendment immunity without regard to the source of the money that supplies the Fund. Respondent's contrary argument is simply mistaken. *See, e.g., Hess v. Port Authority Trans-Hudson Corp.*, __ U.S. __, 115 S.Ct. 394, 402-406 (1994); *Mercer v. Magnant*, 40 F.3d 893, 898-99 (7th Cir. 1994).

5. Respondent next requests the Court to stay its hand on this issue until more lower courts have ruled on the question. Opp. Br. at 6-7. But several lower courts already *have* ruled on the question, and reached different results. True, the Seventh Circuit is the first Court of Appeals to address the validity of 11 U.S.C. 106. But it is hardly the first lower appellate court to address the broader question raised here -- whether Congress has authority under its Article I powers to waive a State's immunity from money-damages actions and, if so, whether that authority extends equally to each Article I power. *See Seminole Tribe of Florida v. State of Florida, et. al.*, 11 F.3d 1016 (11th Cir. 1994), *cert. granted*, No. 94-12 (finding no authority under Indian Commerce Clause); *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995) (finding authority under Copyright Clause). Because the Courts of Appeals already have split on this important federal question, because the breadth and rationale of the Court's plurality decision in *Pennsylvania v. Union Gas* remains unclear, and because the States all support Ohio's request to resolve this issue now, there is no tenable reason for delaying consideration of the issue.

6. Respondent finally requests the Court to hold the petition for its decision in *Seminole Tribe*, No. *94-12*. Opp. Br. at 7. Petitioners do not disagree. However, if the Court is not going to reach the question of congressional authority in *Seminole Tribe*, then Petitioners respectfully request the Court to grant certiorari now.

CONCLUSION

For these reasons and those mentioned in the petition, certiorari should be granted in this case.

Respectfully submitted,

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